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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

SPOKANE COUNTY, SPOKANE COUNTY SHERIFF'S OFFICE; OZZIE KNEZOVICH, individually and in his capacity as Spokane County Sheriff; JOANNE LAKE, in her official and individual capacity; LYNETTE BROWN, in her official and individual capacity,

Defendants.

No. CV-11-029-RHW

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

WITH ORAL ARGUMENT

Prison Legal News respectfully moves for an order preliminarily enjoining Defendants from enforcing unconstitutional policies to censor Plaintiff's subscription materials, book catalogs, and letters, and ordering Defendants to afford to Plaintiff due process notice and an opportunity to be heard to challenge Defendants' censorship decisions.

I. FACTS

A. Parties

Plaintiff Prison Legal News ("PLN") is a project of the Human Rights Defense Center, a non-profit corporation. Declaration of Paul Wright ¶1. PLN publishes a monthly journal of corrections, news, and analysis by the same name: *Prison Legal News: Dedicated to Protecting Human Rights*. *Id.* ¶2. PLN has over 7,000 subscribers in the U.S. and abroad, including attorneys, journalists, public libraries, judges, and prisoners at about 2,200 correctional facilities nationwide. *Id.* ¶¶3-4. PLN engages in protected speech and expressive conduct on matters of public concern, such as prison operations and conditions, prisoner health and safety, and prisoners' rights. *Id.* ¶5; *see Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005) (PLN's mail to prisoners is protected by the First Amendment).

Defendants include Spokane County and the Spokane County Sheriff's Office—which operates the Spokane County Jail and the Geiger Corrections Center (collectively "the Spokane County Jail" or "the Jail") in Spokane, Washington. These facilities house convicted prisoners and pretrial detainees charged with federal or state crimes. *See, e.g., Rentz v. Spokane County*, 438 F. Supp. 2d 1252, 1254 (E.D. Wa. 2006); *Brown v. Manning*, 630 F. Supp. 391, 394 (E.D. Wa. 1985). The average daily population for these facilities combined is 1,170 prisoners. *See* Ex. 1[1] to Declaration of Jesse Wing.

Defendant Ozzie Knezovich is the Sheriff of Spokane County. *See* Ex. 2.

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[1] All numbered exhibits are attached to the Declaration of Jesse Wing; all lettered exhibits are attached to the Declaration of Paul Wright.

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The Sheriff is responsible for Jail operations, and the training and supervision of its staff, including those who interpret and implement the mail policy for prisoners. *See* RCW 36.28.010. The Sheriff is the policymaker for the Jail, including its mail policies. *Cf. Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir. 1991) (holding sheriff is policymaker). News articles state that Defendant Joanne Lake is a Lieutenant with the Sheriff's Office and Defendant Lynette Brown was Office Manager for the Jail when it created the current mail policy, and that they were responsible for and personally participated in creating the policy. *See* Ex. 3.

B. Spokane County Jail Censors PLN's Mailings

In August and September 2010, Prison Legal News mailed its monthly journal, a soft-cover book entitled *Protecting Your Health and Safety*, informational brochures about subscribing to PLN, and a catalog of books that PLN offers, addressed personally to prisoners at the Spokane County Jail. *See* Wright Dec. ¶¶6-7, 14; *E.g.*, Exs. DDD, EEE, FFF, GGG, and HHH.

But the Jail rejected the one-page informational brochures, book catalogs, and book offers that PLN mailed to nearly 30 prisoners. *Id.* ¶¶8-9; Exs. A through AA. When censoring these mailings, the Jail stamped the envelopes "Return to Sender" and returned them to PLN, *id.*, marked with different justifications. The Jail stamped "unauthorized content" on thirteen of the envelopes, but did not explain what was unauthorized, or why. *See* Exs. O-Z, AA. The Jail stamped eleven envelopes "unauthorized content" with the notation "postcard policy" on three and "not a post card" on eight, without any explanation of what that meant. *See* Exs. A-C, D-E, H, J-N. The Jail returned three envelopes stamped "Exceeds

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¼" thickness/size limit" that did not exceed ¼" thickness and were identical to other mail returned for other reasons. *Compare* Exs. F-G, I with Exs. A-E, H, J-K.

The Jail also censored 24 issues of the journal *Prison Legal News* mailed to prisoners. Wright Dec. ¶11; Exs. BB through YY. Defendants stamped the envelopes with the ambiguous phrase "unauthorized content" as the sole justification for rejecting 23 journals. Exs. BB-LL, NN-YY. On the 24th, Defendants added the phrase "not a postcard" as its justification. Ex. MM.

Similarly, the Jail censored four copies of the book *Protecting Your Health and Safety* that PLN had mailed to prisoners, Wright Dec. ¶12; Exs. ZZ-CCC, stamping "unauthorized content" as the sole justification for rejection, *id.*

Although they returned censored envelopes, journals, and books to PLN, Defendants never notified PLN of any opportunity to appeal the Defendants' censorship decisions. *See* Wright Dec. ¶13; Exs. A through CCC thereto.

C. Defendants Censored Mail Under Facially Unconstitutional Policies

1. Unconstitutional Ban on Incoming Mail that is Not a Postcard

On August 10, 2010, the Office of Sheriff Knezovich issued a press release titled "Changes Coming To Inmate Mail," which stated: "September 1st marks the day when Spokane County Detention Services enacts new rules that restrict incoming and outgoing mail to 5.5" x 8.5" postcards." Ex. 4. The postcards-only policy prohibits mail other than "non-glossy" and "pre-franked" postcards (apart from "legal and official mail.") Ex. 5 at 1.

The Sheriff's press release claims, "The principal benefit of the change is added safety to inmates and staff. Potentially hazardous substances can be secreted

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into envelopes which corrections officers have to open." Ex. 4. News accounts say that the Jail claims, "the change comes down to time and money… Restricting mail to postcards means fewer staff members needed to inspect and sort. In just the few weeks of the new policy the mail volume has been cut in half." Ex. 6.

As explained above, the Jail has censored many of PLN's informational brochures, book catalogs, and book offers pursuant to its new "postcard policy."

2. Unconstitutional Ban on Book Catalogs

Defendants' new mail policy also restricts the types of "Publications" allowed in prison to: "newspapers, paperback books, and approved magazines". Ex. 5 at pg. 6. On its face, this policy prohibits all other types of publications including catalogs such as the book catalogs that PLN mailed to prisoners, which the Jail censored. *See, e.g.*, Exs. A through L. When rejecting thirteen catalogs, the Jail claimed "unauthorized content" without explanation. *See* Exs. O-Z, AA. For eleven others, the Jail identified the postcard-only policy as its reason for rejection. Since the Jail failed to articulate its justification, it is unclear whether the Jail relied on its "postcard only" or "no catalogs" policy, or both, to censor these mailings.

3. Unconstitutional Lack of Procedural Due Process Protections

As set forth above, when rejecting PLN's monthly journal, its soft-cover books, and many envelopes containing informational brochures, book catalogs, and book offers, Defendants stamped the phrase "unauthorized content" as the sole reason for rejection. The Jail did not notify PLN what was unauthorized. Wright Dec. ¶13. Similarly, when the Jail rejected PLN's mailings on the grounds "not a

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post card" or "postcard policy," Defendants did not articulate its policy. *Id.*

The mail policies of the Spokane County Jail fail to require the Defendants to notify the sender of rejected mail that Defendants censored it, or the reasons for censorship. *See* Ex. 5. Nor does the Jail policy require notice to the sender, or an opportunity to appeal the censorship decisions. *Id.*

By adopting and applying these policies to censor Prison Legal News's mail to prisoners, and by doing so without due process, the Jail is unconstitutionally interfering with protected expressive activities and chilling future speech. Since PLN will continue to communicate with prisoners confined in the Spokane County Jail, Defendants' policies and practices will likely violate PLN's free speech rights in the future without due process, causing irreparable harm. Wright Dec. ¶16.

II. ARGUMENT

A. Preliminary Injunction Standard

When asked to grant a preliminary injunction where the public interest is at stake, a court must consider whether: (1) the plaintiff is likely to succeed on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *California Pharmacists Assoc. v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009); *see also* Fed. R. Civ. P. 65(a).

B. PLN is Likely to Succeed on the Merits

1. First Amendment

Plaintiff's right to correspond with prisoners through the mail is protected by the First Amendment. *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) ("*PLN II*"). In *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989), the

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Supreme Court recognized that publishers have a protected First Amendment interest in access to prisoners. *See also Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) ("*PLN I*").

Prison Legal News's correspondence with prisoners is "core protected speech" because it addresses issues of corrections policy and other social and political matters of public concern, which "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted); *see also PLN I*, 238 F.3d at 1149. "[T]he conditions in this Nation's prisons are a matter that is both newsworthy and of the greatest public importance." *Pell v. Procunier*, 417 U.S. 817, 831, n.7 (1974). A "blanket prohibition against receipt of the publications by any prisoner carries a heavy presumption of unconstitutionality." *Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982).

To withstand First Amendment scrutiny, a prison policy must be "reasonably related to legitimate penological interests" under the four "Turner" factors:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective, (2) whether there are alternative avenues that remain open to the inmates to exercise the right, (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

PLN II, 397 F.3d at 699 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The first of these factors can be dispositive: "if a regulation is not rationally related to a legitimate and neutral governmental objective, a court need not reach the remaining three factors." *Id.*; *see also, PLN I*, 238 F.3d at 1151.

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Defendants are required under *Turner* to articulate how their policy furthers a legitimate penological interest; it may not be presumed:

> The initial burden is on the State to put forth a "common-sense" connection between its policy and a legitimate penal interest. If the State does so, the plaintiff must present evidence that refutes the connection. *Id.* at 357. The State must then present enough counter-evidence to show that the connection is not so "remote as to render the policy arbitrary or irrational." *Id.*

Clement v. Cal. Dept. of Corrections, 220 F. Supp.2d 1098, 1109 (N.D. Cal. 2002) (citing *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999)).

Although corrections officials often emphasize that courts afford deference to their experience, it is well-recognized that the *Turner* test "is not toothless." *Thornburgh*, 490 U.S. at 414.

> Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then *demonstrate* both that those specific interests are *the actual bases* for their policies and that the policies are reasonably related to the furtherance of the identified interests. An *evidentiary showing* is required as to each point.

Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990) (emphasis added). The government may not pile "conjecture upon conjecture" to justify infringement of constitutional rights. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

Postcard-Only Policy Unconstitutionally Infringes Free Speech

(1) First Factor: The Ban is Irrational

Applying *Turner*, the Ninth Circuit has repeatedly rejected the same rationales offered by the government here to justify prison policies that arbitrarily restrict a publisher's right to communicate by mail with prisoners. *See PLN II*, 397 F.3d 692, 699-701 (9th Cir. 2005) (striking down ban of non-subscription bulk mail and catalogs); *Ashker v. California Dept. of Corrections*, 350 F.3d 917, 924

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(9th Cir. 2003) (striking down policy requiring approved vendor labels); *PLN I*, 238 F.3d 1145, 1149-1151 (9th Cir. 2001) (striking down ban on bulk rate non-profit subscription mail); *Morrison v. Hall*, 261 F.3d 896, 904-05 (9th Cir. 2001) (striking down ban on for-profit bulk rate mail); *Crofton v. Roe*, 170 F.3d 957, 959-61 (9th Cir. 1999) (striking down ban on gift subscriptions).

Here, the same outcome is likely. Spokane County Jail representatives stated publicly that the "Postcard Only" policy was implemented to save time and money, and increase security. Exs. 4 and 6. These objectives do not justify the Jail's extremely broad censorship policy, banning all mail other than postcards.

The Ninth Circuit Has Previously Rejected Defendants' Justifications

In *PLN I*, the Oregon Department of Corrections asserted that banning all standard-rate mail enhanced prison security because mailroom staff could concentrate on "timely processing acceptable mail and thoroughly inspecting such mail for content and contraband." 238 F.3d at 1151. The Ninth Circuit rejected this rationale: "The reality is that all incoming mail must be sorted . . . distinguishing between non-profit organization standard mail and regular/ commercial standard mail is not unduly cumbersome[.]" *Id.* Similarly, in *PLN II*, when the Washington Department of Corrections claimed that it banned non-subscription bulk mail to reduce mail volume and increase security, the Court rejected this rationale again: "While mailroom staff may have to spend more time analyzing the content of non-subscription bulk rate mail and catalogs, such a ban . . . is not rationally related to the goal of reducing contraband." 397 F.3d at 700.

Here, too, Defendants' "postcard only" policy is a grossly overbroad and

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arbitrary means of achieving its goals.

The Policy is Not Rationally Related to Saving Time and Money

Inspecting and delivering mail other than a postcard is not significantly more burdensome than censoring the mail, which includes, at least: (i) stamping the mail "Return to Sender"; (ii) writing "postcard policy"; (iii) returning the censored mail; (iv) writing a Mail Rejection Notice; and (v) delivering the notice to the prisoner. And, if Defendants provided constitutionally required due process notice and an opportunity to be heard *to the sender* of the mail (which they do not, *see* Section II(B)(2), below) the Jail's claim that its new policy saves time and money is meritless. Moreover, as explained more below, since correspondents must send multiple postcards to communicate what they could fit in a letter the Jail must process all of them instead of the contents of one envelope. This further undoes any rational connection between the Jail's stated interests and its mail policy.

The Policy is Not Rationally Related to Enhancing Security

The postcard-only policy is a substantially overbroad means of enhancing security. The mail policy already bans "[a]ny mail and/or items that are deemed detrimental to the safety, security, and orderly operation" of the Jail. Until September 2010, the Jail screened for security threats in other ways, which it has not shown to be ineffective. And, the policy captures *all* correspondence, including those least likely to contain hazardous substances—like letters from publishers.

Importantly, even if it could show that its postcard-only policy leads to some savings of time or money, the Jail nevertheless cannot place constitutionally-protected speech on the chopping block to cut costs. In other contexts where the

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constitutionality of prison regulations has been challenged, the Ninth Circuit has held that "efficiency and cost effectiveness" are not "valid *security* concerns." *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1994) (emphasis in original) (holding prison's "cost and management concerns . . . must be applied consistently with the requirements of Title IX."). Free speech is not a commodity like paper towels that the Jail can reduce to save money so as to have more time for security.

The Policy is Overbroad and Arbitrary

Defendants have no legitimate justification for singling out all regular mail except postcards to censor. The Defendants' distinction between forms of written communications is arbitrary—and harmful. Letters, book catalogs, and written communications other than postcards often contain core political and social speech or invite the reader to request such speech. Letters facilitate the exchange of views on poor jail conditions and how to alleviate them, on legal rights, on how to address private medical, psychological, and educational needs, and many other important topics. For centuries, letters have facilitated exchange of ideas, in detail.

In stark contrast, postcards provide so little space that meaningful exchange of ideas is all but foreclosed. Defendants' solution of allowing correspondents to mail multiple postcards is absurd. *See* Ex. 5 at pg. 1. And there is virtually no corresponding benefit to Defendants, who must review each postcard. For example, in place of a correspondent's three-page 8.5" x 11" paper letter in a single envelope the Jail would have to review and process more than six postcards written by the sender conveying the same speech. There is no appreciable decrease in mail volume except at the arbitrary expense of speech.

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The Policy Deters Speech

Importantly, the only reasonable explanation for the Defendants' statement that their "Postcard Only" policy will save time and money is that it deters, chills, and suppresses speech. *See* Wright Dec. ¶17-19; *see also Ashker v. California Dept. of Corrections*, 350 F.3d 917, 921 (9th Cir. 2003) (noting that the prison's approved-vender label policy caused publisher to stop sending books to correctional facilities). Indeed, Defendants have applauded their policy's effectiveness stating that the "mail volume has been cut in half." Ex. 6. Since the policy requires publishers and others who wish to communicate with prisoners to conform their written communications to an unusual and burdensome form, it is not surprising that many correspondents have been deterred from speaking entirely.

In fact, limiting speech to a postcard causes significant inconvenience and increased costs sufficient to substantially reduce the speech of many family members, friends, and professionals such as doctors, and is sufficient to deter publishers, booksellers, companies, and others from communicating at all. Family members and friends must find a store that sells postcards, buy multiple postcards and postage for each of them, and fit their communications within the small confines of the card, allowing room for their own name and address, the addressee's name and address, postage, the postmark, and the Jail's "received" stamp. Correspondingly, it is completely impractical to think that most publishers, booksellers, and others would spend the resources to create special postcards just to communicate their messages to the prisoners at this Jail. In short, if mail volume went down it is because Defendants have stamped out protected speech.

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The Policy Impedes Rehabilitation

Under the guise of accomplishing objectives that are irrationally and arbitrarily connected to Defendants' policy, the "Postcard Only" policy *hampers* the penological objective of rehabilitation. The Supreme Court has recognized that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation[.]" *Procunier v. Martinez*, 416 U.S. 396, 412-413 (1974), overruled in part on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). Indeed:

> Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process. . . . Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community.

Martinez, 416 U.S. at 413 n. 13 (quoting Policy Statement 7300.1A of the Federal Bureau of Prisons and Policy Guidelines for the Association of State Correctional Administrators); *see also Morrison v. Hall,* 261 F.3d 896, 904 n. 7 (9th Cir. 2001).

As in *PLN I* and *PLN II*, Plaintiff will likely show Defendant's "Postcard Only" policy is not rationally related to a legitimate penological objective.

(2) Second Turner Factor: Alternatives for Plaintiff

The second *Turner* factor is whether Defendants afford Plaintiff an alternative means to exercise its constitutional rights. They do not. PLN has no practical way to reach its intended audience. PLN cannot communicate its speech *by mail* because its letters and brochures to thousands of persons across the country are not written on postcards, and its catalog describing 43 different books for sale does not fit onto a postcard. Wright Dec. ¶17. PLN cannot effectively

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communicate its written speech by telephone or fly from Vermont to Washington to meet with prisoners. *Id.* Like most publishers, PLN cannot tailor its correspondence to the irrational requirements of a particular jail. *Id.*

Courts have rejected mail policies requiring speech to be communicated by a particular medium. In *Morrison v. Hall,* 261 F.3d 896 (9th Cir. 2001), the Ninth Circuit rejected the Oregon DOC's argument that it could ban bulk-rate mail because prisoners may listen to radio or watch television instead: "Although radio and television are alternative media by which inmates may receive information about the 'outside' world, they should not be considered a substitute for reading newspapers and magazines." *Id.* at 904. Twenty-five years ago, the Fifth Circuit rejected the same argument in *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986):

> [T]he contents of television are different from what one finds in the printed media. It is not up to the Midland County Sheriff or this court to decide that television can adequately serve the first amendment right to receive protected materials.

Costly alternatives have likewise been held inadequate. In *PLN I*, 238 F.3d at 1149, and *Morrison*, 261 F.3d at 904, the Ninth Circuit denied the governments' claims that banning bulk rate mail was permissible because publishers could send mail via first or second class, holding that forcing a publisher to "take additional costly steps" to communicate with prisoners is unconstitutional.

(3) Third Turner Factor: Effect on Defendants' Resources

The third Turner factor is the effect on prison staffing and resource allocation. *Turner*, 482 U.S. at 90. "[T]he policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction." *Morrison*, 261 F.3d at 905 (quoting *Martinez*, 416 U.S. at 414 n.14).

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PLN has communicated its letters, catalogs, and brochures via mail to thousands of prisoners country-wide since its founding in 1990. Wright Dec. ¶3. It distributes its journal to about 2,200 correctional facilities, including the Federal Bureau of Prisons ("BOP") housing 209,770 prisoners, Ex. 9, and the Washington Department of Corrections ("WDOC") housing over 16,000, Ex. 10.

Neither the BOP nor the WDOC restrict incoming mail to postcards, or bans catalogs. *See* Exs. 7, 8. This is strong evidence the third *Turner* factor favors PLN.

(4) Fourth Turner Factor: Defendants' Alternatives

The fourth *Turner* factor is whether prison authorities have "readily available" alternatives. "[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner,* 482 U.S. at 90. Regardless of the Defendants' claimed justifications, the fact that more than 2,000 correctional facilities nationwide accept PLN's materials suggests that the Jail's ban is an exaggerated response. *See Hrdlicka v. Reniff*, --- F.3d ----, 2011 WL 285220, *10 (9th Cir., Jan. 31, 2011) (holding widespread distribution of publisher's materials suggests jails' bans may be exaggerated response). Indeed, until September of last year, Defendants accepted envelopes too.

Banning Catalogs Is Irrational

Prison Legal News is likely to show that Defendants' catalog ban[2] is

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[2] Defendants' mail policy bans all catalogs and other publications that are not a newspaper, paperback book, or approved magazines. *See* Ex. 5, at pg. 6.

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unconstitutional. In *PLN II*, the Ninth Circuit held that a blanket ban on catalogs violates the First Amendment, and permanently enjoined the Washington Department of Corrections's ban. 397 F.3d 692, 696 (9th Cir. 2005). A political subdivision of Washington, the Spokane Jail is bound by Ninth Circuit precedent.

Book catalogs can spark interest in science, literature, music, art, and human rights. PLN's 2010 book catalog describes 43 books, dictionaries, and resource materials on the rights of prisoners regarding health and safety, self-representation in court, finding a lawyer, job searches, successful reentry upon release from prison, and the mental health crisis in prisons. *See* Ex. GGG. Since the Ninth Circuit has already held under the first *Turner* factor that censoring catalogs is irrational, and unconstitutional, no analysis under the other factors is warranted.

2. Fourteenth Amendment

The Supreme Court long ago recognized that a publisher's right to communicate with prisoners is rooted not only in the First Amendment, but also in the Fourteenth Amendment. *Pell v. Procunier*, 417 U.S. 817, 832 (1974). Thus,

> [T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards. The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a "liberty" interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion . . .

Martinez, 416 U.S. at 417-18. Repeatedly, the Ninth Circuit and Eastern District of Washington have reaffirmed this core principle that notice and an opportunity to appeal censorship by prisons is required by the Constitution. *See, e.g., PLN I*, 238

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F.3d at 1152-53; *PLN II*, 397 F.3d at 701; *Krug v. Lutz*, 329 F.3d 692, 697-98 (9th Cir. 2003); *Miniken v. Walter*, 978 F.Supp. 1356, 1363-64 (E.D. Wa. 1997).

> Publishers have a right to procedural due process because:
>
> Without notifying the free citizen of the impending rejection, he would not be able to challenge the decision which may infringe his right to free speech . . . [and] since the inmate-recipient would not have seen the contents of the withheld letter, he may require the aid of the author to meaningfully challenge the rejection decision.

Martin v. Kelley, 803 F.2d 236, 243-44 (6th Cir. 1986); *see also, Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996); *Cofone v. Manson,* 409 F.Supp. 1033, 1042 (D. Conn. 1976).

Although Defendants are constitutionally mandated to afford due process protections to publishers when censoring prisoner mail, Defendants have plainly failed to do so. Defendants gave grossly inadequate notice when censoring Prison Legal News's publications, catalogs, books, and correspondence. For some mailings, the Jail merely returned the material stamped with the uninformative moniker "unauthorized content" without identifying to PLN which aspects were not authorized, why, and what policy applies. When censoring other mailings, the Jail's stated justifications were merely "not a post card," "unauthorized content, not a post card," or "exceeds 1/4" thickness/size limit." These perfunctory and obtuse notations did not sufficiently notify PLN what was objectionable and how the publisher could cure any defect, or challenge the rejection.

Further, Defendants failed to provide Plaintiff with *any* opportunity to be heard to challenge the censorship decisions. Defendants' rejection stamp provides *no* information to Plaintiff about how to challenge rejection decisions, who to

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contact, what the appeal must contain, or any deadlines. *See* Wright Dec. ¶13; Exs. A-CCC. Nor do Defendants' mail polices provide any appeal rights or procedures.

The Jail's failure to afford PLN an opportunity to be heard interfered with the correction of obviously erroneous censorship. For example, the Jail wrote the words "exceeds 1/4" thickness/size limit" as the basis for censorship on several envelopes that contained three folded standard pieces of paper, self-evidently well under 1/4" in thickness. Further, the opportunity to be heard would have been important to challenge the Jail's statement of *different* reasons for rejecting identical materials. For example, the Jail rejected the same informational brochures and book catalogs sent by PLN to different prisoners by marking some "unauthorized content," others "not a postcard" and yet others "exceeds 1/4" thickness/size limit." *See e.g.* Exs. A, F, and J. And, the Jail sometimes gave the prisoner addressee one reason for rejection but gave a different reason to PLN. For example, when the Jail rejected PLN's August 2010 *Prison Legal News* magazine sent to prisoner Bacon, the Jail told PLN "unauthorized content" was the reason for rejection, while it told Mr. Bacon the mail was "Not Legal." *Compare* Exs. OOO, NNN, and LLL; *see also,* Exs. U and III; XX and JJJ; G and KKK; B, LLL, and MMM; AAA and PPP. An opportunity to be heard is a crucial, constitutionally-mandated chance to correct errors, which Defendants denied to PLN.

Prison Legal News has a strong likelihood of showing that Defendants have violated, and will continue to violate, its procedural due process rights.

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C. PLN Continues to Suffer Irreparable Harm as a Result of the Censorship

"[A]n alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (internal citation omitted). Indeed, the Fourth Circuit has held that the court "has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right." *Henry v. Greenville Airport Com'n*, 284 F.2d 631, 633 (4th Cir. 1960).

Here, Defendants continue to inflict irreparable harm on Prison Legal News by enforcing their blanket policies to censor PLN correspondence and book catalogs mailed to prisoners. Wright Dec. ¶¶16-19. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). And, Defendants are likely to continue giving inadequate notice for censoring PLN's future communications and continue denying PLN the opportunity to be heard to challenge the censorship.

D. The Balance of Hardships Tips In Favor of Plaintiff

Here, the irreparable harm suffered by Prison Legal News is concrete, severe, and ongoing. Without due process, the government will continue to censor the publisher's mail to prisoners by banning its subscription forms, book catalogs, book offers, and other mailings containing core protected speech about publications that criticize government policies, educate on the rights of prisoners, and that offer insights on the criminal justice system and jail conditions. In contrast, any potential injuries to the Defendants are minimal and speculative. No great cost or expenditure of time is required to lift the policies to allow PLN to

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communicate with prisoners. The balance of hardships strongly favors Plaintiff.

E. The Public Interest Favors Free Flow of Information

The First Amendment furthers a compelling public interest. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The public has an important interest in protecting the "marketplace of ideas" wherever it may be found, and in the continued vitality of the Bill of Rights. At the heart of the First Amendment is the right of the press to disseminate and exchange information on important issues of public concern, in particular when that discussion may be critical of the government. The public interest weighs strongly in favor of enjoining Defendants from enforcing their postcard only-policy and their ban on delivering PLN book catalogs.

III. CONCLUSION

Plaintiffs have shown a likelihood of success on the merits and irreparable harm, whereas Defendants will suffer no meaningful harm from entry of a preliminary injunction. Accordingly, Plaintiff asks that the Court to order a preliminary injunction, and waive any bond.

DATED this 2nd day of February, 2011.

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CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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